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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 197

HAROLD Z. KAPLAN, ET AL., *Petitioners,*

v.

LEHMAN BROTHERS, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR REHEARING

PRELIMINARY STATEMENT

By order dated November 13, 1967 this Court denied petitioners' application for a Writ of Certiorari to review the judgment of the Court of Appeals for the Seventh Circuit (371 F. 2d 409) affirming the opinion of the District Court granting respondents' motion for summary judgment (250 F. Supp. 562). The petitioners requested and were granted an extension of time through and including January 8, 1968 within

which to file a petition for rehearing.* The petitioners assert that, as will be demonstrated, there are intervening circumstances of controlling effect and other grounds which although available were not previously presented which this Court should consider. The petitioners hereby apply for rehearing of the order denying their petition for writ of certiorari.

REASONS FOR GRANTING REHEARING

I

Conflict Has Arisen Since the Refusal of This Court to Review the Order of the Seventh Circuit Court of Appeals

On November 29, 1967 only two weeks after this Court's refusal to review the order of the Seventh Circuit Court of Appeals in this case, Manuel F. Cohen, Chairman of the United States Securities and Exchange Commission (SEC) addressed the Investment Bankers Association. In his speech, Chairman Cohen articulated the SEC's interpretation of the lower courts' decisions in the subject case and of this Court's refusal to review the case. Chairman Cohen's speech demonstrates vividly the conflict now existing between the Seventh Circuit Court of Appeals, and the Governmental agency having legislative authority of administering the fixing of reasonable rates of commissions (19(b)(9) of the Securities and Exchange Act of 1934).

Chairman Cohen in his speech stated in part:

> In my view, it would be a mistake to read the decisions, in the *Kaplan* case as meaning that stock ex-

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* Mr. Justice Fortas on November 22, 1967 granted petitioners' request for an extension of time.

> changes are free to fix prices for the services provided by their members without worrying about the national policies reflected in the antitrust laws. . . . The decisions in that case did not deal with the question of whether a particular schedule, or whether certain related practices, were susceptible to attack under the antitrust laws.
>
> It is also essential to any understanding of the matter to recall that the defendants urged, and the courts accepted, the view that an exemption of an application of the *per se* doctrine was available only because of the responsibility and authority of the Securities and Exchange Commission; that is, that such antitrust exemption as is available exists only because of the SEC's power to review all aspects of Commission rates and charges fixed by a stock exchange presumably in a manner which will give adequate recognition to the national policies underlying the antitrust laws . . .
>
> In other words, the disposition of the *Kaplan* case has not detracted from the urgency of this question. It has only made possible a considered and comprehensive review of all aspects of the problem by the stock exchanges and by us, subject to review when appropriate by the courts.

The tenor and timing of Chairman Cohen's address manifest an apparent impatience and frustration with the conduct of the New York Stock Exchange (NYSE), subsequent to this Court's action in refusing to review the matter. In a report published in the *Wall Street Journal* of *November 22, 1967,* it appears that although the NYSE has been grappling with the problem of rate discounts since 1953, it stated that it would be at least 18 months before any formal proposal would be made to its governing board. The report then continued: "An official of the Securities and Exchange Commission expressed surprise that the Big Board has put off a decision on Commissions by 18

months. 'If they say it's going to take that long, what can I say—other than it's a shame,' he remarked."[1]

It is obvious from this recitation of post-decision facts, that the SEC and the Seventh Circuit view the decisions differently, with the NYSE following the Seventh Circuit's view.

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[1] In what appears to be a belated attempt to give lip-service to the dissenting opinion of the Chief Justice in the *Kaplan* case and the Chairman's Speech, the NYSE on January 2, 1968 presented to the SEC so-called "proposals" relating to certain Exchange Practices such as give-ups discounts and other related practices which have been the subject of widespread criticism. At the same time the Exchange issued a press release which received nation wide publicity. For example, the *New York Times* of January 3, 1968: "The proposals, regarded as a basis for negotiation between the exchange and the SEC, reflect the growing impact of institutions such as mutual funds upon the market place." It should be noted that the Exchange package lacked any specifics. For example, the NYSE's first proposal to allow discounts on volume transactions presented no details. Indeed, the proposal gave no reference to the SEC Act's reasonable rate standard or the relevance and application of such a standard to whatever discounts might be adopted. The proposals themselves can hardly be viewed as anything more than a token gesture. The last three points in the package are designed to lure back lost commission business and to beat back the competitive challenge to the NYSE by curtailing brokerage activities in the regional exchanges and in the third market. The present package is in this regard reminiscent of the 1964 NYSE proposals to consider block discounts *coupled with a general increase* of commission rates. Nothing came of this package which was finally withdrawn—demonstrating the all or nothing aspect of a package approach. Can the NYSE hope to escape the well established prohibitions of the Antitrust laws and this Nation's commitment to a policy of free competition by the mere submission of generalized proposals without either supporting data or implementing details? Certainly these proposals are nowhere near the careful and studied approach which problems of this magnitude required, as stated by the Chief Justice a blunderbuss approach to problems in this field "falls far short of the close analysis and delicate weighing process mandated by this Court in *Silver*." *Kaplan* v. *Lehman Brothers, supra.*

The Seventh Circuit stated "We accordingly interpret the district court's action as holding that the antitrust laws are inapplicable to the New York Stock Exchange insofar as its prescribing of minimum Commission rates is concerned." *Kaplan* v. *Lehman Brothers,* 371 F. 2d 409, 411. The decision of that court can therefore only be viewed as completely immunizing from the antitrust laws a practice, time and time again, determined to be *per se* illegal.[2] *United States* v. *National Assn. of Real Estate Boards,* 339 U.S. 485 (1950); *United States* v. *Sacony-Vacuum Oil Co.,* 310 U.S. 150 (1940); *United States* v. *Trenton Potteries Co.,* 273 U.S. 392 (1927). *Compare Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963). The decision of the Court of Appeals, as it stands now, would make it possible for the New York Stock Exchange to fix rates which are unfair and unreasonable.[3]

Referring to Chairman Cohen's speech again, it should be emphasized that the SEC does not construe the decisions cited in *Kaplan* or *Kaplan* itself as a grant of blanket immunity. Compare *Silver* v. *New York Stock Exchange, supra.* To the contrary "The *Kaplan* case dealt only with the broad question of the right of the New York Stock Exchange to fix and to

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[2] The Exchange Act does not provide for antitrust immunity and legislative history intimates no such exemption. Certainly when Congress has desired to grant antitrust immunity in similar situations, it has manifested that intent. See Clayton Act § 6, 15 U.S.C. § 17, Webb-Pomerene Act; 15 U.S.C. § 62; Walter-McCarran Act, 15 U.S.C. § 1012.

[3] See 19 W. Res. L. Rev. 167 (1967); Accord, Nerenberg, Applicability of the Antitrust Laws to the Securities Field, 16 W. Res. L. Rev. 131, 150-51 (1964); Note, Antitrust and the Stock Exchange: Minimum Commission or Free Competition? 18 STAN. L. REV. 213, 224-25 (1965).

maintain a schedule of minimum rates."[4] It was not decided "whether a particular schedule or whether certain related practices were susceptible to attack under the antitrust laws." (See Chairman Cohen's speech, *supra*). In other words while the particular practice might not be illegal *per se* it could still be subject to the antitrust law. "In my view," continued Chairman Cohen, "*It would be a mistake* to read the decisions . . . as meaning that stock exchanges are free to fix prices for services without worrying about the national policies reflected in the antitrust laws." (Emphasis added)

Chairman Cohen's statements appear to sound an alarm for this Court to grant this petition for a rehearing in order that the decisions below can be corrected and limitations of the implied exemption from the antitrust laws, if any, be precisely drawn.[5] Indeed, re-

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[4] This point of fixing *minimum* rates is still open to criticism for it does not square with the legislative history. See petition for certiorari at p. 41. See also, Hearings on Stock Exchange Practice before the Senate Committee on Banking and Currency, 73 Cong. 1st and 2nd Session pp. 6432, 6467, 7705, 7483-84, 7752-57. The bill conferred regulatory authority to fix the method of fixing "uniform" rates of commission. In Committee it was argued that uniform rates would permit exchanges to charge "All that the traffic will bear" for the commission could only alter rates if they were inconsistent. Thereafter the word "uniform" was replaced by "*reasonable*".

[5] The Chairman is well aware that the antitrust laws have applicability and utility in the context of an already regulated industry. *See* Hale & Hale, *Competition or Control I; The Chaos in the Cases*, 106 U. PA. L. REV. 641 (1958); Hale & Hale, *Competition or Control II; Radio & Television Broadcasting*, 107 U. PA. L. REV. 585 (1959); Hale & Hale, *Competition or Control III; Motor Carriers*, 108 U. PA. L. REV. 775 (1960); Hale & Hale, *Competition or Control IV; Air Carriers*, 109 U. PA. L. REV. 311 (1961); Hale & Hale, *Competition or Control V; Production & Distribution of Electrical Energy*, 110 U. PA. L. REV. 57 (1961);

view by this Court would be responsive to the Chief Justice's statement "In my view, this blunderbluss approach falls far short of the close analysis and delicate weighing process mandated by this Court in *Silver.*" *Kaplan* v. *Lehman Brothers, supra.*

II

The Prevailing Uncertainty Left in the Wake of This Court's Refusal to Review Necessitates the Establishment of Guidelines

Another intervening circumstance which necessitates a review of the subject case is the decision rendered by this Court in *Case-Swayne* v. *Sunkist Growers, Inc.* on December 18, 1967. Analysis of that decision brings into focus the uncertainty which has been created by the refusal of the court to review this case. As was stated by the Chief Justice in his dissenting opinion "Without expressing any final view on the merits of the controversy, I am concerned that the law on this subject is to be permitted to lie where it has aimlessly fallen by virtue of the scanty opinion below." *Kaplan* v. *Lehman,* —— U.S. ——, 19 Led. 2d 365, 367.

In *Case-Swayne,* the Court was called upon to construe the express grant of immunity from the antitrust laws provided for in Section 1 of the Capper-Volstead Act.

That decision reaffirms the controlling principle that even where there is an express exemption from the antitrust laws, the manner in which the exemption is

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Hale & Hale, *Competition or Control VI; Application of the Antitrust Laws to Regulated Industries,* 111 U. PA. L. REV. 46 (1962); Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility,* 67 HARV. L. REV. 436 (1954).

employed will be strictly construed.[6] The Court will not permit the dismissal of an action merely because the defense of immunity has been raised, the district court must be permitted to examine the challenged activity to determine whether or not it falls within the precise limitations as to the purpose and breadth of the exemption.[7] See concurring opinion of Mr. Justice White —— U.S. ——, 36 L.W. 4075, 4076. *Cf. Employing Plasterers Assn.* v. *United States,* 347 U.S. 186 (1954).

In refusing to review the decision of the Court of Appeals for the Seventh Circuit in this case the Court has permitted not only an exemption from the antitrust laws but permitted to remain on the books the Seventh Circuit opinion granting total immunity from the prescriptions of the Sherman Act, all contrary to the teaching of *Silver.* Certainly this is an anomalous result in view of the *Case-Swayne* narrow construction of an express exemption, and the Court's long standing position that repeals of the antitrust laws by implication are strongly disfavored. *United States* v. *Philadelphia National Bank,* 374 U.S., 321 (1963).

This Court in *Case-Swayne* did not permit the plaintiff to be thrown out of Court even with an express grant of immunity in view of the gravity of the anti-

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[6] *United States* v. *Borden,* 308 U.S. 188 (1939); *Georgia* v. *Penn. R. Co.,* 324 U.S. 439 (1945); *U.S. Alkali Assn.* v. *United States,* 325 U.S. 196 (1945); *United States* v. *E.I. duPont de Nemours,* 351 U.S. 377 (1956).

[7] Recently this Court granted certiorari in *American Federation of Musicians of United States and Canada, et al.* v. *Carroll,* No. 309 for the purpose of construing the express exemption granted under the Norris-LaGuardia and Clayton Acts. Certainly this is also an intervening circumstance of controlling importance.

trust allegations. By a parity of reasoning it is difficult to reconcile how this Court can now permit the plaintiffs to be thrown out of Court on a motion for summary judgment on the strength of an *implied* immunity and without a consideration of the merits of the case.

It is clear in light of these recent developments that the Court should review the matter if for no other reason than to establish guidelines. If there is an implied exemption from the antitrust laws then the Court should dispel any doubts and should define the scope and perimeter of the exemption. For example, as recently as its decision in *United States* v. *Arnold, Schwin & Co.*, —— U.S. ——, 388 U.S. 365, this Court found it necessary to set forth guidelines with regard to the permissible use of consignment agreements and restraints on use after sale. *Id.* at 374, 376.

Just as it was necessary in *Schwinn* to analyze a prevalent business practice in conflict with the antitrust laws for the purpose of setting the periphery, the instant case demands even more so the Court's attention. ". . . [t]he claims advanced by petitioners raise important questions not only as to the compatibility of the Exchange's rate-fixing practice with this Nation's commitment, embodied in the antitrust laws, to competitive pricing, but also to the fulfillment of the goal of investor protection embodied in the securities laws." *Kaplan* v. *Lehman, supra,* at 367.

The need for guidelines in this area is critical for the practice of fixing minimum commission rates is the fount and origin of give ups, a form of reciprocal dealing. See Petition for Certiorari at pp. 23-24.

In recent hearings before the House Subcommittee on Commerce and Finance of the Committee on Interstate and Foreign Commerce to amend the Investment Act of 1940 and the Investment Advisers Act of 1940, Chairman Cohen, stated the manner in which give-ups operate and he reflected in response to questioning a dissatisfaction with the practice. The Chairman also expressed serious doubt as to the SEC's authority to direct the flow of give-ups. (Tr. 151-152. Yet Mr. Haack, President of the NYSE and Mr. Levy, Chairman of the Board of Governors, explained the reciprocal nature of give ups and asserted that "reciprocity is part of the American way of life." (Tr. 584-585). This court in *Federal Trade Commission* v. *Consolidated Foods Corp.,* 380 U.S. 592 (1966) held that reciprocity is one of the congeries of antitrust practices at which the antitrust laws are aimed. See also *United States* v. *General Dynamics Corp.,* 258 F. Supp. 36 (S.D.N.Y. 1966). The concept of reciprocity injects into the competitive milieu the prospect of substantial harm as a consequence of leverage and other alien market factors.[8]

The hearings before the House Subcommittee demonstrate the need for immediate action by the Court to define the scope and nature of any implied immunity of the antitrust laws in the area of securities transactions. Suits have been filed in other jurisdictions challenging various exchange practices and calling for examination of the antitrust exemption under other Acts, for example, *Eisen* v. *Carlisle & Jacquelin,* 41 F.R.D. 147 (S.D.N.Y. 1966) involving odd-lot price dif-

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[8] See generally, Kestenbaum, Is Reciprocity Illegal Immoral or Just Fattening, 22 Record of the Association of the Bar of the City of New York 576.

ferentials. In that case a motion to dismiss the suit as a class action had been granted, and the plaintiff appealed. The defendants made a motion to dismiss appeal which was denied 370 F. 2d 119, *cert, denied.*, —— U.S. ——, 19 Led. 2d 598. The appeal on its merits is now pending in the Second Circuit Court of Appeals and was just argued to the Court of Appeals on November 6, 1967.

Similarly *Marnell* v. *United Parcel Service of America, Inc.*, 260 F. Supp. 391 (N.D. Cal. 1966) requires an examination of the antitrust immunity granted by the I.C.C. Act. In that case plaintiff sued for treble damages under Sherman 1. The defendant made motion to dismiss on the ground that the challenged practices were immune from antitrust scrutiny. The court denied the motion. In a well reasoned opinion Judge Sweigert studied the problem of the scope of antitrust immunities, analyzed the decided cases, and arrived at a conclusion directly opposite to that arrived at by the lower courts in the *Kaplan* case. "On no occasion has the Supreme Court held that a federal regulatory act has by implication *completely* displaced the antitrust laws. ". . . [t]he Court, has on two occasions, held that the antitrust laws could not be applied to the precise acts charged in the antitrust suit because of a repugnancy between the antitrust laws and the regulatory statutes governing these acts." Id. at 400. (Emphasis added.)

From these two cases it is apparent that the problems which this case raises for decision will be faced again. It is therefore urged that the Court review the matter now so that guidelines may be established and needless time, expense and litigation spared.

III

There Is Presented a Substantial Ground for Review Not Previously Emphasized Which Is of Controlling Importance

The preceding two points set forth in this petition have demonstrated the conflict and uncertainty which have intervened since the order of this Court denying review and which necessitate the establishment of guidelines. However, there is yet another ground which although not previously stressed by the petitioners is implicit in the petitioners' case and is of a controlling nature. Simply stated, the issue in the instant case is whether after inquiry into the specifics of commission rate structure, rate practices and their impact upon the marketplace, commerce is unreasonably restrained.

The recent decisions of this Court in *United States* v. *Sealy,* —— U.S. ——, 388 U.S. 350 and *United States* v. *Arnold Schwinn Co.,* —— U.S. ——, 388 U.S. 365, bear careful scrutiny. In the Sealy decision it was determined that vertical restrictions on distributors could be reasonable restraints of trade protected by the antitrust laws. However, in that case the Court determined the Sealy arrangement in use for over forty years was a horizontal arrangement among licensees so that the restrictions employed were *per se* illegal. Consequently, it was unnecessary to consider the business or economic justifications, their impact in the marketplace or their reasonableness. The subject case. on the other hand, presents for this Court's determination a consideration of reasonableness of the restraint of fixing minimum commission rates and related practices.

As observed in *United States* v. *Arnold Schwinn & Co.*, 388 U.S. 365, 374:

> [S]o here we must look to the specifics of the challenged practices and their impact upon the marketplace in order to make a judgment as to whether the restraint is or is not 'reasonable' in the special sense in which § 1 of the Sherman Act must be read for purposes of this type of inquiry. *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918); *Standard Oil Co.* v. *United States*, 221 U.S. 1, 51 (1911); *Apex Hosiery* v. *Leader*, 310 U.S. 469, 498 (1940).

No such inquiry or close analysis was made. The sweeping exemption from the antitrust laws accorded by the court below swept under the carpet ancillary effects and consequences of fixed rates, i.e. denial of discounts and the practice of reciprocal give-ups of commissions, without so much as taking note of their existence. The refusal to make judicial inquiry does not for a moment change the motive, intent, design and character of the interwoven restraints of commerce embodied in respondents' commission law and practice, nor does the refusal of judicial inquiry diminish the impact of such restraints upon investors. Such restraints are what they are—predatory, invidious, anti-competitive and corruptive, and barring inquiry does not cure them, nor does it vindicate the public's right to have them cured. The summary opinion of the court below invoked an implied antitrust immunity without so much as making a beginning at laying bare the economic and business stuff of rate structure and practices. The blanket immunity conferred, in the name of self-regulation, precluded any weighing process, much less a delicate weighing process, whereby a

crucial distinction might have been made between good faith, arguably justified restraints of commerce embodied in commission law and practice versus restraints which are the product of bad faith and predatory motives and which are patently repugnant to aims and objectives of the Exchange Act, and legitimate limits of self-regulation.

In *Schwinn,* the Court determined that certain consignment practices which might be permissible when engaged in by small companies or companies just breaking into the market could become unreasonable restraints of trade in the hands of dominant companies. This determination is of great importance when carried over to the securities field. It has been called to this Court's attention that only a few brokers receive 50% of all commissions (Petition pp. 11-12.) and dominate the brokerage business. Certainly the challenged practices, even if determined to be exempt from the *per se* test of illegality, could be an unreasonable restraint of trade when it is recalled that members of the New York Stock Exchange transact over 90% of all brokerage business in stocks in the United States. This type of market power is permeated with anticompetitive effects which can only be remedied by this Court granting review and setting forth the operable guidelines of any implied exemption. The denial of certiorari has affirmed the *form* of a statutory scheme, i.e., the Exchange Act, as effecting an implied repeal of the antitrust laws without the barest need to reconcile substantive objectives of both the Exchange Act and the antitrust laws.

CONCLUSION

For the foregoing reasons, the Court should then order review of the matter, vacate the order of November 13, 1967 and invite the Solicitor General and the Securities and Exchange Commission to submit briefs and participate in argument so that the public interest may be fully explored.[9]

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CERTIFICATE OF COUNSEL

I, Anthony Bradley Eben, being the attorney for petitioners do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 of the Rules of this Court.

ANTHONY BRADLEY EBEN

[9] The petitioners have taken the liberty of transmitting to the Solicitor General and General Counsel of the SEC copies of this Petition for Rehearing.